RECENT CASES.

BILLS AND NOTES — PURCHASE FOR VALUE. — A bank discounted a note for the payee before maturity and credited the amount of the purchase price to his account. Before the account was drawn upon, the bank received notice of entire failure of consideration for the note. *Held*, that under the Negotiable Instruments Law the bank is not a purchaser for value. *Albany Co. Bank* v. *People's Co-Operative Ice Co.*, 30 N. Y. L. J. 2023 (N. Y. Sup. Ct., App. Div.). See NOTES, p. 563.

CONFLICT OF LAWS — JURISDICTION OVER TRUST CREATED ABROAD. — A domiciled Englishman married a Scotchwoman in Scotland. The wife's property, consisting mainly of heritable bonds, was put in settlement under Scotch law, a non-alienable, alimentary provision being made for the husband if he survived. The trustees were Englishmen. The husband survived and mortgaged his interest. The provision against alienation was valid by Scotch; but void by English law. The mortgagees claimed payment of the income. *Held*, that the settlement is governed by Scotch law, and therefore the mortgage is invalid. *In re Fitzgerald*, [1904] 1 Ch. 573.

This decision reverses the holding of the Divisional court in the same case, which was discussed in 17 HARV. L. REV. 123. The principal ground for the decision is that the property placed in settlement consisted chiefly of heritable bonds, which are regarded as immovables, and therefore to be treated like any other immovables in Scotland. The court also relied upon the fact that the settlement was drawn in Scotch form and subject to limitations valid only by Scotch law.

CONFLICT OF LAWS — LAW GOVERNING MAKING OF CONTRACTS. — A contract of insurance made in the state of Washington provided that it should be construed as if made in New York, but contained a stipulation for forfeiture and an express waiver of any statutory provision contrary to such stipulation. *Held*, that a New York statute forbidding such forfeiture is ineffectual to prevent the forfeiture. *Mutual Life Ins. Co.* v. *Hill*, U. S. Sup. Ct., Apr. 4, 1904.

The court has previously stated that, unless forbidden by statute or by the policy of the jurisdiction where the contract first becomes binding, the parties may agree that the law of the place of performance shall apply. *London Assurance* v. *Companhia de Moagens*, 167 U. S. 149, 161. In the absence of agreement, it has, according to the circumstances of different cases, presumed that the parties intended to adopt the law of the place of making, of the place of performance, or of either place which would uphold the validity of the contract. See *Pritchard* v. *Norton*, 106 U. S. 124, 136–137. The present decision establishes the propositions that the law of the place of making, here that of Washington, always governs, and that all stipulations or presumptions as to the applicability of other laws have only the force and effect of other ordinary provisions of the contract. Although contrary to what has hitherto been supposed to be the doctrine of the court, even by the United States Circuit Court of Appeals, it conflicts with no prior Supreme Court decision, and rests upon the sound principle that rights are created, not by will of the parties, but by law. See 3 Beale, Cases on Conflict of Laws, 540–541; *Mutual Life Ins. Co.* v. *Dingley*, 100 Fed. Rep. 408; *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 462.

CONFLICT OF LAWS — WHAT LAW GOVERNS IN USURY. — A building and loan association domiciled in New York made a loan in Mississippi to a party in that state, the principal and interest to be payable in New York City. After having paid the interest, as stipulated, the borrower brought an action under a Mississippi statute to recover the interest paid on the loan, claiming that it was usurious. *Held*, that the contract is governed by Mississippi law, and hence the interest paid can be recovered. *Building & Loan Association* v. *Brahan*, 24 Sup. Ct. Rep. 532. See NOTES, p. 568.

CONSTITUTIONAL LAW — RIGHT OF EQUITY TO REGULATE CONFLICTING EASEMENTS. — The franchise of a trolley line gave it the right to cross the tracks of an existing steam railroad. A city, acting under its charter, passed an ordinance regulating the manner in which the trolley line should cross the railroad. The latter complained that such regulations were inadequate. *Held*, that a court of chancery may, under the Constitution of New Jersey, regulate the manner in which these conflicting easements

shall be enjoyed. *West Jersey, etc., Co.* v. *Atlantic City, etc., Co.*, 56 Atl. Rep. 890 (N. J. Ch.).

It seems to be well settled that a legislature by giving a franchise to a railroad company does not thereby preclude itself from later granting to another company the right to cross the tracks of the former, for every company may fairly be presumed to take its franchise subject to such a contingency. *Connecting Ry. Co.* v. *Union Ry. Co.*, 108 Ill. 265. But where by later enactment a legislature assumes to define the meaning of an earlier grant, it is usurping judicial functions. *Commonwealth* v. *Proprietors of New Bedford Bridge*, 2 Gray (Mass.) 339. Although there is nothing in the Constitution of the United States which forbids a state legislature from exercising such a power, the Constitution of New Jersey, like that of most other states, does contain such a prohibition. See *Satterlee* v. *Matthewson*, 2 Pet. (U. S.) 413; *cf. Boykin* v. *Shaffer*, 13 La. An. 129. Under such a provision, as the present case shows, the interpretation of a franchise, like the interpretation of any contract, is properly for the court alone; and where such franchise causes a conflict of easements over the same *locus*, equity, with its remedies by injunction and receivership, has inherent jurisdiction to settle the rights of the different parties.

CONTRIBUTORY NEGLIGENCE — STANDARD OF CARE FOR CHILDREN. — *Held*, that an infant, whether he be *sui juris* or not, is not in law excused from exercising such care as is commensurate with his years and intelligence in approaching and passing known objects and places of danger. *Atchason* v. *United Traction Co.*, 90 N. Y. App. Div. 571.

In an action to recover damages for the negligent injuring of a child by a defective machine the jury were instructed that if the plaintiff, by exercising such care as his mental and physical capacity at the time fitted him to exercise, could have avoided the injury, he could not recover; but if in the exercise of all his mental capacity he did not know the machine was dangerous, and the accident happened by means of the defect therein, he would be entitled to recover. *Held*, that the charge correctly states the law. *Eagle & Phenix Mills* v. *Herron*, 46 S. E. Rep. 405 (Ga.). See NOTES, p. 564.

CORPORATIONS — INCORPORATION BY TWO STATES — FORECLOSURE PROCEEDINGS. — A manufacturing company was incorporated in both Alabama and Georgia, but conducted all its business as if only one corporation existed. A mortgage was given to an Alabama mortgagee, and subsequently a foreclosure decree made by the federal circuit court for Georgia was followed by a sale. The company, which had not been served as an Alabama corporation, filed a bill for redemption in the Alabama state court. The purchaser at the foreclosure sale applied to the federal circuit court for Georgia to enjoin the Alabama action, joining as defendants citizens of the same state as the purchaser. *Held*, that the court lacks jurisdiction of the bill. *Alabama & Georgia Mfg. Co.* v. *Riverdale Cotton Mills*, 127 Fed. Rep. 497 (C. C. A., Fifth Circ.).

As other grounds of jurisdiction are lacking, the court could entertain the bill only if the relief sought were ancillary to the original foreclosure decree. *Root* v. *Woolworth*, 150 U. S. 401. It cannot be considered ancillary unless the original bill was one against the Alabama corporation. There is some argument for holding that it was, since a single corporation conducted all business transactions, and that corporation appeared in the foreclosure proceedings. The Alabama corporation was concededly bound by the mortgage, and all persons really interested were represented in the foreclosure. The great weight of authority is, however, that the corporate entity created by one state is to be regarded as distinct from that created by another, although the two habitually act as one. *Missouri, etc., Ry. Co.* v. *Meeh*, 69 Fed. Rep. 753. There are in law, therefore, two principals represented by the same agents, and if the foreclosure proceeding is to bind both principals, the agents should be served as the agents of both. As no sufficient reason appears for departing from the ordinary method of proceeding against a corporation, the majority view seems preferable.

CORPORATIONS — TRANSFER OF STOCK BY MARRIED WOMAN — ESTOPPEL. — A statute provided that a contract of sale made by a married woman with her husband should be invalid unless sanctioned by order of the court. The plaintiff, a married woman, owned stock in the defendant corporation. Without authority from the court she sold her certificates to her husband, who, accompanied by her attorney, went to the defendant and obtained new certificates, which he sold to a *bona fide* purchaser. The defendant throughout had no knowledge of her marriage to the first transferee. The plaintiff brought an action for dividends, and asked that new certificates be issued to her. *Held*, that the plaintiff has no cause of action. *Bigby* v. *Atlanta, etc., R. R. Co.*, 46 S. E. Rep. 827 (Ga.).

The decision rests on the ground that the plaintiff's shares are now, without any fault on the part of the defendant, held by a *bona fide* purchaser from whom the plaintiff could not recover them. But it is not necessary, in order to protect the *bona fide* purchaser, to say that he has acquired the plaintiff's shares. As in the case of a transfer void for forgery, it is sufficient for him that he purchased certificates issued by the defendant. The decision, however, may possibly be supported on another ground. When the defendant gave new certificates to the husband, its consideration was the surrender of the old certificates. It gave value to the husband in good faith for certificates really owned by the wife, but it did so in the belief that her husband was the owner. As the plaintiff both encouraged this belief and concealed her marriage to the transferee, she should not be allowed to profit by her wrong at the defendant's expense. *Cf. Dotterer* v. *Pike*, 60 Ga. 29.

DAMAGES — NEGLIGENT TRANSMISSION OF TELEGRAM — MENTAL SUFFERING. — The defendant company negligently transmitted a telegram sent by the plaintiff, causing her great mental suffering but no physical damage. *Held*, that this is an injury, sounding in tort, for which the plaintiff can recover. *Cowan* v. *Western Union Telegraph Co.*, 98 N. W. Rep. 281 (Ia.).

A recovery is allowed for mental suffering in cases of wilful or negligent injury where the mental pain is merely one element in the damages. *McKinley* v. *Chicago, etc., R. R. Co.*, 44 Ia. 314. There is a conflict of authority whether in cases of fright resulting in physical damage an action is allowed. When permitted, however, it is based on the physical injury caused by the negligence, and not on the intervening mental disturbance. *Purcell* v. *St. Paul City Ry. Co.*, 48 Minn. 134. In a few extreme cases courts have awarded damages, punitive in nature, for wilful injury to the feelings. *Lawson* v. *Chase*, 47 Minn. 307. Although the principal case ultimately relies upon an analogy with cases drawn from each of these classes, it is readily distinguishable from them, for the act complained of was negligent, not wilful, passive, not active, and the mental suffering was the sole basis of damages. The principal case, then, though following a previous Iowa decision, is a distinct extension of the ordinary tort liability, and the weight of authority is against it. *Chase* v. *Western Union Telegraph Co.*, 44 Fed. Rep. 554. *Contra, Mentzer* v. *Western Union Telegraph Co.*, 93 Ia. 752.

DEDICATION — ACCEPTANCE BY MUNICIPALITY — EFFECT. — The plaintiff's grantor was in 1850 the owner of an undivided half of land, now the site of Brookport. In that year the owners recorded an unacknowledged plat of this land with reference to which they sold lots along a strip designated as Water Street. This strip was used as a street both before and after the incorporation of the defendant, and the defendant expended money in its repair. The plaintiff filed a bill for partition of Water Street. *Held*, that the bill must be dismissed. *Owen* v. *Village of Brookport*, 69 N. E. Rep. 952 (Ill.).

The first reason given in denying the plaintiff any interest is that the title by dedication is in the defendant. In Illinois, as in many states, a statutory dedication passes the fee to the municipality; but in order to have this effect the requirements of the statute, one of which is the acknowledgment of the plat, must be fulfilled. *Lyman* v. *Gedney*, 114 Ill. 388. As there was no acknowledgment in the principal case, there was originally only a common law dedication giving the public an easement, but leaving the fee in the dedicators. *Banks* v. *Ogden*, 69 U. S. 57. The court, while admitting this principle, argues that when the defendant afterwards accepted this dedication, it acquired not only an easement but the title itself. This position seems unsound. An acceptance by the defendant would have passed the title had there been a statutory dedication, but as the requirements of the statute were not fulfilled, such acceptance could do no more than make the defendant the trustee of the easement already acquired and would have no effect whatever on the title. *Marsh* v. *Village of Fairbury*, 163 Ill. 401.

EQUITY — MANDATORY INJUNCTION — RES BEYOND THE JURISDICTION. — The complainant was entitled to water from a stream in Nevada. The defendant built a ditch in California which diverted the water from the stream to the injury of the complainant's rights. *Held*, that the United States Circuit Court in the district of Nevada has jurisdiction to enjoin such diversion. *Miller & Lux* v. *Rickey*, 127 Fed. Rep. 573 (Circ. Ct., Dist. of Nev.).

The court considered that since it had personal service on the defendant it could order him to alter his ditch. It is submitted that this jurisdiction should not be asserted. Courts universally refuse to send their own officers into other jurisdictions to abate nuisances or to partition land. *Mississippi, etc., R. R. Co.* v. *Ward*, 2 Black

(U. S.) 485; *Wimer* v. *Wimer*, 82 Va. 890. The same objections in general apply to requiring a defendant to do similar acts in a foreign jurisdiction. In either case the court is meddling with land in another jurisdiction, and can grant no protection to those executing its decrees. The United States Circuit Court would, in this particular, have no greater powers than a state court. *Northern, etc., R. R. Co.* v. *Michigan Central R. R. Co.*, 15 How. (U. S.) 233. It is true that equity may sometimes properly affect foreign lands indirectly, as by enjoining a trespass. *Great Falls Mfg. Co.* v. *Worster*, 23 N. H. 462. But where a plaintiff asks affirmative relief, most courts, on grounds of policy if for no other reason, would require that it be sought in the jurisdiction where the defendant is to act. *Stillman & Co.* v. *White Rock Co.*, 3 Woodb. & M. 538; *contra*, *Willey* v. *Decker*, 73 Pac. Rep. 210 (Wyo.).

EQUITY — TRUSTEE'S BILL FOR INSTRUCTIONS — CLAIM ADVERSE TO LEGAL TITLE. — The plaintiff, trustee of a mortgage to secure bonds, received from the mortgagor a fund for the payment of coupons. Before maturity of the coupons the defendant sued the mortgagor, and by notice to the plaintiff attached the fund in its hands. The defendant, although he had obtained judgment, refused after request by the plaintiff to levy on the fund attached. The bondholders demanded payment of their coupons. *Held*, that the plaintiff may maintain a suit in equity against the defendant alone to have the validity of his lien determined. *Holland Trust Co.* v. *Sutherland*, 69 N. E. Rep. 647 (N. Y.).

A bill of interpleader could not have been sustained, since one claim is to the legal title, the other to an equitable interest. The *res* is not the same. The court treated the action rather as a trustee's bill for instructions. It is generally said that such a bill will lie only if neither of the claims is adverse to the trust. *Grecne* v. *Mumford*, 4 R. I. 313. Yet one case has been found in which equity gave relief where the settlor claimed that the trust deed had not been legally delivered. *Fraser* v. *Davie*, 11 S. C. 56. And the chief requisite for such jurisdiction is the existence of no other means of so determining rights as to protect the trustee from the risk of future liability. See *Bullard* v. *Attorney-General*, 153 Mass. 249. Certainly no such means exist here. The trustee company cannot successfully move to vacate the attachment. *Key West Ass'n* v. *Bank of Key West*, 18 N. Y. Supp. 390. It could, indeed, bring trespass after levy. *Boscher* v. *Roullier*, 4 Abb. Pr. (N. Y.) 396. But it cannot force the defendant to proceed to execution, and meanwhile it cannot safely pay the waiting bondholders without the authority of the court. The decision, though it goes beyond the authorities, is hardly against them.

EVIDENCE — WRITINGS COLLATERAL TO THE ISSUE. — The plaintiff, in a suit on an oral contract for work and materials, was allowed to put in parol evidence of the contents of a written contract between the defendant and a third party, in order to show that the work for which he sought to recover was not included in that contract. *Held*, that the evidence is not admissible. *Taft* v. *Little*, 178 N. Y. 127. See NOTES, p. 560.

FALSE PRETENSES — OBTAINING GOODS SENT BY CARRIER — VENUE. — The defendant, in Allegheny County, Pennsylvania, by false pretenses induced a firm in New York to ship goods to him. *Held*, that the Allegheny County Court has jurisdiction. *Commonwealth* v. *Schmunk*, 56 Atl. Rep. 1088 (Pa.).

It is universally held that the offense of obtaining goods by false pretenses is committed where the goods are obtained, without regard to where the pretenses were made. *State* v. *House*, 55 Ia. 466. As under most shipping contracts the carrier is properly held to be the agent of the vendee, the courts generally reach the conclusion that goods consigned to the vendee are "obtained" by him when they are delivered to the common carrier. *Norris* v. *State*, 25 Oh. St. 217; *cf. Wilcox Silver Plate Co.* v. *Green*, 72 N. Y. 17. If, however, the contract, fairly interpreted, shows that the carrier is to be treated as the agent of the vendor, it might well be held that the goods are obtained only when actually received by the vendee. No facts to justify this interpretation appear in the principal case, and it would therefore seem that the former rule should have been applied. The decision is the more remarkable from the fact that in an earlier case in Pennsylvania a lower court had adopted the opposite rule. *Commonwealth* v. *Goldstein*, 3 Pa. Co. Ct. Rep. 121.

FEDERAL COURTS — JURISDICTION — ENJOINING PROCEEDINGS IN STATE COURTS. The insured had instituted proceedings in the state courts on policies issued by several insurance companies. Some of the causes had been removed to the federal courts on the ground of diversity of citizenship, but the rest could not be removed on account of the insufficiency of the amount in controversy. The insurers were liable

pro rata if at all, and the same defense had been interposed to all the actions. *Held*, that the prosecution of the suits in the state courts may be enjoined by a federal court of equity, pending a settlement by it of the questions common to all the suits. *Rochester, etc., Ins. Co.* v. *Schmidt*, 126 Fed. Rep. 998 (Circ. Ct., Dist. of S. C.).

Proceedings in the equity side of a federal court to try a question common to several suits at law in the same court, are regarded as ancillary to the proceedings at law, and this fact of itself is sufficient to confer jurisdiction. *Freeman* v. *Howe*, 24 How. (U. S.) 450, 460. It seems, however, an unwarranted extension of this rule which enables a federal court to join in the proceeding parties to suits in the state courts. This being true, there is difficulty in justifying the injunction against further proceedings in the state courts. Although this prerogative is denied to federal courts, except as incidental to bankruptcy jurisdiction, by U. S. Comp. St. 1901, p. 581, it is held that U. S. Comp. St. 1901, p. 580, empowers a federal court which has assumed jurisdiction, to enjoin subsequent proceedings in the state courts, when this is necessary to protect its own jurisdiction. *Fisk* v. *Union Pacific Ry. Co.*, 10 Blatchf. (U. S.) 518. The principal case does not fall within this exception, and the considerations of economy and convenience which would naturally dispose the court to grant the relief can hardly justify a direct violation of the statute first cited. One other decision, however, has reached the same result. *Virginia, etc., Co.* v. *Home Insurance Co.*, 113 Fed. Rep. 1.

FEDERAL COURTS — REMOVAL OF CAUSES — SUBSEQUENT JURISDICTION OF STATE COURT. — An action brought in a state court was removed by the defendant into the federal court, where the plaintiff secured a dismissal without prejudice. Subsequently the plaintiff brought a similar action on the same facts in the same state court. *Held*, that the court has jurisdiction. *De Witt* v. *Chesapeake, etc., Ry. Co.*, 79 S. W. Rep. 275 (Ky.).

When a case has been properly removed from a state to a federal court, the jurisdiction of the former over the action is at an end. *Kern* v. *Huidekoper*, 103 U. S. 485. Whether the state court may later entertain a similar action on the same facts if the first has been withdrawn without any decision on the merits, appears not to be settled. It has been held in Kentucky that it may do so. *Adams Express Co.* v. *Schofield*, 64 S. W. Rep. 903. The authority of this decision however was later weakened by Kentucky *dicta* which took the opposite view. See *Chesapeake, etc., Ry. Co* v. *Riddle's Adm'x*, 72 S. W. Rep. 22 (Ky.). There are several cases in apparent accord with these *dicta* and opposed to the present decision. *Baltimore, etc., R. R. Co.* v. *Fulton*, 59 Oh. St. 575. The view of the principal case is believed to be the better. The general rule is that whenever an action is dismissed without a determination of its merits, matters stand as they did before action brought. See *Loeb* v. *Willis*, 100 N. Y. 231. No good reason appears why a different rule should apply to cases which have been removed to a federal court and there dismissed.

HUSBAND AND WIFE — ACTION AGAINST WIFE'S RELATIVES FOR ENTICING HER AWAY. — A brother and brother-in-law gave their married sister advice in consequence of which she left her husband. *Held*, that they are liable to the husband in damages unless their advice was asked by the wife and was given in good faith. *Smith* v. *Kaye and Robinson*, 48 Sol. Jour. 271 (Eng., Leicester Assizes).

It was early established that a man could have an action against any one who enticed away his wife. *Winsmore* v. *Greenback*, Willes 577. In the United States some cases still hold that any one giving unsought advice in consequence of which the wife leaves her husband is liable. *Modissett* v. *McPike*, 74 Mo. 636. The great weight of authority, however, is that parents and near relatives are protected in advising a wife if they do so in good faith for her good. *Glass* v. *Bennett*, 89 Tenn. 478. This exception is based on the natural affection and duty between members of a family which require them to have thought for each other's welfare as well after as before marriage. In England the subject seems now to have come up for the first time, and in the absence of precedent for this protection of relatives, the inferior court which decided the case not unnaturally followed the strict principle of the early law.

INFANTS — AVOIDANCE OF CONTRACTS — RESTORING STATUS QUO. — In a suit by a minor to recover the premiums paid on a life insurance contract which he had repudiated, the defendant contended that the expense to which it had been put in maintaining the policy should be deducted from the premiums. *Held*, that the plaintiff can recover the entire amount of the premiums. *Simpson* v. *Prudential Insurance Co. of America*, 68 N. E. Rep. 673 (Mass.).

As the contract of insurance was not for a necessary, the plaintiff could avoid it on the ground of infancy. There is, however, a conflict as to the rights of the parties in

case of such rescission. It is generally held that after the infant disaffirms the contract the adult may recover the consideration, if it is in the infant's possession; but if not, he is without remedy. *Shirk* v. *Shultz*, 113 Ind. 571. Some states require compensation for deterioration of the consideration, or payment of its value, as a condition to rescission. *Heath* v. *Stevens*, 48 N. H. 251. The Massachusetts court has previously held that if a contract is of such a nature as to be clearly beneficial to the infant, and is fully executed, the infant, if he rescind, must put the adult in *statu quo*. *Breed* v. *Judd*, 1 Gray (Mass.) 455. There seems, however, to have been no decision that the adult should be made whole when, as in the principal case, the contract was not plainly beneficial to the infant.

INJUNCTIONS — PREVENTION OF CRIMINAL PROSECUTION. — The county attorney threatened to prosecute the plaintiff's salesmen for selling alcohol to druggists to be used as a drug. The plaintiff sought to enjoin him on the ground that such sales were not in violation of the statute. *Held*, that equity is without jurisdiction. *Greiner-Kelly Drug Co.* v. *Truett*, 79 S. W. Rep. 4 (Tex., Sup. Ct.). See NOTES, p. 567.

INJUNCTIONS — PROTECTION OF DE JURE PUBLIC OFFICER. — The keeper of a penitentiary sought by injunction to restrain certain commissioners and the sheriff from proceeding under a void statute to remove him and put the penitentiary in charge of the sheriff. *Held*, that equity has no jurisdiction in the case. *Corscadden* v. *Haswell*, 177 N. Y. 499.

Equity will not pass upon a disputed title to public office, but leaves the parties to law. *Tappan* v. *Gray*, 9 Paige (N. Y.) 507; *Harding* v. *Eichinger*, 57 Oh. St. 371. On this basis four judges in the principal case refused an injunction. But the three dissenting judges seem right in concluding that, as by the facts the defendants were acting without color of right, title to office was not in dispute. The question, then, is whether equity will protect an officer *de jure* from admittedly unlawful interference and dispossession. There is a twofold reason why equity should take jurisdiction: first, it serves the public by preserving the stability of public offices without attempting to control them; and second, it gives the incumbent the only adequate remedy by preventing loss of office and its emoluments, and the interruption of his work, as opposed to legal actions for reinstatement and damages after the wrong is done. *Armigo* v. *Baca*, 3 N. Mex. 294. This conclusion is supported *a fortiori* by those cases which protect *de facto* officers, pending actions at law. *Brady* v. *Sweetland*, 13 Kan. 41.

INNKEEPERS — DUTY TO GUESTS — TORT OF SERVANT. — The defendant was the proprietor of a hotel at which the plaintiff and his family were guests. The plaintiff's infant son was injured by the discharge of a revolver, fired by the defendant's servant. It did not appear whether the discharge was accidental or intentional. The plaintiff sued the defendant for breach of contract. *Held*, that the defendant is liable for breach of an implied contract to protect his guest. *Clancy* v. *Barker*, 98 N. W. Rep. 440 (Neb.).

As the act of the servant was clearly outside the scope of his duty, the master would not be liable from the point of view of the law of agency. *Morier* v. *St. Paul, etc., Ry. Co.*, 31 Minn. 351. But although no decision upon the exact point decided has been found, the result seems to be in accord with the trend of recent cases. Modern decisions tend to hold a carrier liable for all torts of its servants committed against a passenger during the carriage, on the ground that the contract imposes upon the carrier a duty of protection. *Chicago, etc., Ry. Co.* v. *Flexman*, 9 Ill. App. 250. As an innkeeper bears a somewhat similar relation toward his guests, it would seem that, by analogy, his contract imposes a like duty to protect them. He has been held liable for injuries to his guests caused by third persons, which he might have prevented. *Rommel* v. *Schambacher*, 120 Pa. St. 579. And the principal case is not without support in imposing upon him an absolute liability for injuries to guests caused by his servants. See *Overstreet* v. *Moser*, 88 Mo. App. 72.

INSANE PERSONS — AVOIDANCE OF CONTRACT — RESTORATION OF CONSIDERATION. — The plaintiff sued to set aside her conveyance on the ground of insanity. The grantee had paid a fair consideration, and had acted in ignorance of the plaintiff's incompetency. *Held*, that the grantee must be restored to his original position as a condition precedent to relief. *Coburn v. Raymond*, 57 Atl. Rep. 116 (Conn.).

It is now established in most jurisdictions that the contract of an insane person who has not been so adjudged is not void, but is at most voidable only. *Blinn* v. *Schwarz*, 177 N. Y. 252. If the contract is executory, or made with a person knowing of the incompetency, and is not for necessaries, the insane person may treat it as not binding.

Loomis v. *Spencer*, 2 Paige (N. Y.) 153. As to the rights of a lunatic who has received the benefit of a fair and completely executed contract the decisions are in conflict. A few states hold that his right to avoid such a contract is absolute. *Gibson v. Soper*, 6 Gray (Mass.) 279 But it would seem that protection to the lunatic and justice to innocent persons dealing with him would both best be accomplished by allowing an insane person to set aside such a contract either on returning the consideration or, if he has parted with it, on paying its value. It is, however, almost everywhere held, as in the principal case, that such a contract cannot be set aside unless the parties can be put in *statu quo* by returning the consideration itself. *Molton v. Camroux*, 2 Exch. Rep. 487.

INSURANCE — SUICIDE AS DEFENSE. — A fraternal insurance contract provided that the certificate should be void in case the member died in consequence of the violation or attempted violation of the laws of any state or territory. The insured having committed suicide, this action was brought to recover the amount called for by the certificate. *Held*, that suicide is not a crime under the statutes of the state of Illinois, and is, therefore, no defense to the action. *Royal Circle v. Achterrath*, 68 N. E. Rep. 492 (Ill.). See NOTES, p. 566.

MANDAMUS — PARTIES PETITIONING — SUFFICIENCY OF INTEREST. — A private citizen sought a mandamus to compel the clerk of the county court to allow him to inspect certain poll books and tally sheets for the sole purpose of gathering evidence upon which to base a criminal prosecution for fraudulently conducting an election. *Held*, that mandamus will not lie. *Payne* v. *Staunton*, 46 S. E. Rep. 927 (W. Va.).

In the case of the enforcement of a mere private right by mandamus, the relator must show some special or personal interest in the right. *People* v. *Masonic Benevolent Association*, 98 Ill. 635. And by the weight of authority mandamus will issue where the relator represents and seeks to vindicate a public right, though he have no interest greater than that common to the whole body of citizens. *State* v. *Hannibal, etc., R. R. Co.*, 86 Mo. 13. The principal case proceeds upon the ground that the public as well as the private interest must be a substantial pecuniary one. It would seem that the facts of the case satisfy either requirement. A voter's private pecuniary interest in seeing that his vote is correctly counted is apparently as great as in seeing that he is registered to vote at all; and the public pecuniary interest in honest supervision of elections seems to be as great as in having a proper return by the board of canvassers. In both of these cases mandamus lies. *Davies* v. *McKeeby*, 5 Nev. 369; *Brown* v. *Commissioners of Rush Co.*, 38 Kan. 436. But in any case, as the dissenting opinion cogently points out, the preservation of the purity of the ballot box is a matter of the greatest concern, public and private, and rises above any question of mere pecuniary interest. *State* v. *King*, 154 Ind. 621.

MASTER AND SERVANT — THE FELLOW-SERVANT DOCTRINE APPLIED TO INFANTS. — The plaintiff, a child of twelve, was injured while working in the defendant's mill, by certain machinery set in motion by another employee. The plaintiff, who was non-suited on the ground that the injury was caused by her fellow servant, appealed. *Held*, that the non-suit is erroneous. *Evans* v. *Josephine Mills*, 46 S. E. Rep. 674 (Ga.). See NOTES, p. 562.

NEW TRIAL — EXCESSIVE DAMAGES. — The plaintiff obtained a verdict for twelve thousand dollars in an action against the defendant for negligence. At that time the plaintiff had not yet recovered from the accident, and the extent of her injuries depended largely on the result of an operation which could not be determined until a few weeks after the trial. The defendant asked for a new trial on the ground of excessive damages. *Held*, that the new trial will be granted. *Searles* v. *Elizabeth, etc., Ry. Co.*, 57 Atl. Rep. 134 (N. J., Sup. Ct.).

The power of granting new trials, first exercised to prevent injustice, was originally limited by judicial discretion only. Although rules have been developed in practice which, whether embodied in statutes or not, compel the granting of new trials in certain defined cases, the original discretionary power of the courts as to all other cases has not been affected. See *Fine* v. *Rogers*, 15 Mo. 315. The present decision, in view of its peculiar facts, seems fairly to fall within the latter class. The damages given were not excessive if the plaintiff's injuries were permanent, but to conclude that they were permanent required the assumption of the failure of an operation the result of which was at the time of the trial undetermined. In granting a new trial the court could rely upon no established rule, but it thought that injustice might be done in depriving the defendant of the possible benefit which the ascertainment of the result of the operation might give him, thus resting the case upon the primary reason for granting new trials.

PLEDGES — STOCK REPLEDGED WITH STOCK OF OTHERS. — A broker purchased certain stock for X on margin; M had pledged other stock with him to secure a loan; and H had deposited still other stock with him for safe keeping. All the certificates bore assignments in blank. The broker pledged the whole amount as security for money advanced by T, who acted in good faith on the broker's apparent title. The broker became insolvent, and T sold the securities of M and X, thereby obtaining enough to repay the loan. *Held*, that H is entitled to his securities free and clear. *Tompkins* v. *Morton Trust Co.*, 91 N. Y. App. Div. 274. See NOTES, p. 565.

POST-OFFICE — "PERIODICAL PUBLICATIONS." — The Post-office appropriation bill of March, 3 1879, U. S. Comp. St., p 2646, admits, subject to certain conditions, "periodical publications" to classification as second-class matter. The "Riverside Literature Series" consisted of publications issued monthly, each number being complete in itself, and containing a single novel, story, or collection of stories. *Held*, that these publications are not periodical publications. *Houghton* v. *Payne*, U. S. Sup. Ct., April 11, 1904.

The postal department has in the past regarded all publications issued at regular intervals, which are externally similar and numbered consecutively as periodical publications within the meaning of the statute. The effect of the present decision is to require, in addition to these external facts, a continuity in subject-matter which will make each number a part of a series, not an entity in itself. The term "periodical publication" commonly conveys this idea of continuity. Taking the two words separately, however, the pamphlets in question were "publications" and were also "periodical." The expression seems, indeed, entirely susceptible of either interpretation. In view of this ambiguity, there is considerable weight in the argument of the minority in the principal case that the postal department should be forced to continue its previous practice. *Cf. United States* v. *Finnell*, 185 U. S. 236, 244.

SURETYSHIP — SUBROGATION IN FAVOR OF SURETY INCURRING OBLIGATION WITHOUT REQUEST OF DEBTOR. — An agent gave a bond with sureties to his principal. Without the knowledge of the agent or his sureties, the plaintiff bound himself to pay to the principal any sums due from the agent to the principal which the agent and his sureties should fail to pay, and was, as a consequence, forced to make good a subsequent default. *Held*, that the plaintiff is not subrogated to the principal's rights against the sureties. *Crane* v. *Noel*, 78 S. W. Rep 826 (Mo., Ct. App.).

A stranger who pays a debt without being asked by the debtor, or required to pay in order to protect his own interests, is not subrogated to the creditor's rights against the debtor. *Aetna Ins. Co.* v. *Middleport*, 124 U. S. 534. While conceding the practical injustice of its decision, the court in the principal case regarded the plaintiff as a volunteer, since he was not bound to become a surety, and considered itself bound by the above-stated rule. Since the taking of sureties without the concurrence of the debtor is a usage sanctioned by the business world, it seems unjust to regard such sureties as intermeddlers; and allowing them the right of subrogation does not prejudice the debtor. These considerations led the court to decide in favor of the surety in the only other case found in which the question raised in the principal case was discussed. *Matthews* v. *Aikin*, 1 N. Y. 595.

TAXATION — EXEMPTIONS — FRANCHISE AND PROPERTY TAXES. — In a suit by the collector of taxes for the recovery of a license tax upon the defendant bank's business, the bank set up in defense the following provision of its charter: "the capital of the bank shall be exempt from any tax." *Held*, that this provision exempts the bank from a license tax. Brewer, Fuller, and Harlan, JJ., dissent. *Citizens' Bank of Louisiana* v. *Parker*, 24 Sup. Ct. Rep. 181.

There is a well-recognized distinction between a franchise tax and a property tax, and exemption from one does not necessarily include exemption from the other. *Bank of Commerce* v. *Tennessee*, 161 U. S. 134. This is based on the doctrine that exemption from taxation shall be construed strictly. *Chicago Theological Seminary* v. *Illinois*, 188 U. S. 662. In the principal case, however, the charter was issued in 1833, and the contract which the Supreme Court is now called upon to interpret was made at that time. The exemption intended therefore is to be determined by the meaning of the words at that time, and any ambiguity is to be settled by the circumstances under which the parties then acted. In Louisiana in 1833 the distinction between franchise and property taxes was not understood, and exemption "from any tax" probably included exemption from both. See *City of New Orleans* v. *Southern Bank*, 11 La. Ann. 41. From the conditions surrounding the chartering of this bank, also, it is evident that such was the intention of the parties. See *New Orleans* v. *Citizens' Bank*, 167 U. S. 371.

TAXATION — PROPERTY WITHIN THE JURISDICTION — VALUING PROPERTY OF INTER-STATE EXPRESS COMPANY. — Indiana valued the property of the American Express Company as a unit, and assessed a proportion of that value equal to the proportion of mileage in Indiana. $17,000,000 of such total value resulted from bonds and real estate held outside of Indiana claimed to be not used in the business. The company sought to enjoin the certification of the assessment. *Held*, that the injunction will issue. Fuller, C. J., and Brewer and Day, JJ., dissented. *Fargo* v. *Hart*, 24 Sup. Ct. Rep. 498.

It is settled that property used in an established business derives an additional taxable value from its connection with the remaining business equipment. The majority considered the $17,000,000 in question too remotely connected with the company's business in Indiana to have any direct relation to the value of its property there used. The state claimed that this fund was really used to assure the company's credit. Just what property is used in a given business is essentially a question of fact. The different parts of a railroad are plainly united in use. *Pittsburg, etc., Ry.* v. *Backus*, 154 U. S. 421. The teams of an express company are less closely related to each other, and although they have been held united, the strong dissent indicated that the limit was about reached. *Adams Express Co.* v. *Ohio State Auditor*, 165 U. S. 194. The connection of the business equipment with the property in question here is much more remote, since such property has practically no effect in increasing or facilitating the business done. An assessment increased by it is therefore based on property outside the state and is not permissible. See *Adams Express Co.* v. *Ohio State Auditor*, 166 U. S. 185, 221.

TRUSTS — FOREIGN INVESTMENTS BY TRUSTEE. — The sole objection to a trustee's investment of a small part of the trust funds in real estate was that the property was in a foreign jurisdiction. The trustee acted "in good faith and with sound discretion." *Held*, that the objection is not valid. *Thayer* v. *Dewey*, 69 N. E. Rep. 1074 (Mass.).

This decision is expressly contrary to the prevailing view that to invest in fixed property in a foreign jurisdiction is improper, unless authorized by the creator of the trust or required by special circumstances, such as the protection of other interests of the trust. *Ormiston* v. *Olcott*, 84 N. Y. 339. But in most jurisdictions the field for investments by trustees has always been more arbitrarily limited than in Massachusetts. By the orthodox rule it was confined to public securities and first mortgages on land. *King* v. *Talbot*, 40 N. Y. 76. On the other hand Massachusetts has never recognized such limitations. For example, it early allowed investments in corporate stock if they satisfied the fundamental requirement that they be made in good faith and with the sound discretion of diligent business men seeking permanent investments. *Harvard College* v. *Amory*, 9 Pick. (Mass.) 446. The principal case is a striking application of the Massachusetts policy of refusing to limit arbitrarily this simple requisite.

UNFAIR COMPETITION — MEANS UNLAWFUL AS TO THIRD PARTIES — COERCION BY FINES. — By the by-laws of a granite manufacturers' association, any member who dealt with dealers in granite in a certain town who were non-members of the association, was liable to a fine. Fines were imposed upon several members, and as a result the business of the plaintiff, a non-member, was ruined. *Held*, in an action against the members, that the plaintiff can recover. *Martell* v. *White*, 69 N. E. Rep. 1085 (Mass.). See NOTES, p. 558.

VENDOR AND PURCHASER — VENDOR'S DUTY TO ACCOUNT FOR RENT — APPLICATION OF PAYMENTS. — A vendor of land in the possession of a tenant elected to receive interest from the vendee after the latter's failure to complete the purchase at the appointed time. In a suit for specific performance he claimed the right to appropriate to arrears of rent, due before the date for completion of the bargain, rent paid him by the tenant after that time. *Held*, that the vendor must hold the rents for and on account of the vendee. *Plews* v. *Samuel*, [1904] 1 Ch. 464.

Although a contract for the sale of land creates a relation in a broad sense fiduciary and closely analogous to that of mortgage, yet in some respects the situation is different from the mortgage relation. On default of the vendee at the time for completion of the bargain, the vendor, unlike a mortgagee, has an option to retain the rents and profits or to receive interest on the purchase money. See *Barsht* v. *Tagg*, [1900] 1 Ch. 231. But if, as in the principal case, he chooses the latter, he must account for the rents and profits received, and furthermore is liable for the profits which with due diligence he might have produced. *Phillips* v. *Silvester*, L. R. 8 Ch. 173. In requiring that the vendor shall consider the rent received as current rent, not as arrears, the principal case simply recognizes in a new way this fiduciary position of the vendor, and applies the regular rule of trusts, that when a fiduciary has a choice of conduct his

personal interest may not compete with his duty to his beneficiary. *Cf. Fulton* v. *Whitney*, 66 N. Y. 548.

WILLS — ALTERNATIVE DEVISE TO WIFE OF WITNESS — EFFECT. — Section 15 of the Wills Act provided that a devise to the wife of an attesting witness should, "so far only as concerns such wife, be utterly null and void." The testator devised his property to his wife for life, remainder to his daughter or her children. The daughter, whose husband attested the will, survived the wife and had children. *Held*, that there is an intestacy of the remainder. *Aplin* v. *Stone*, [1904] 1 Ch. 543.

The court, by analogy to the method of applying the rule against perpetuities, first construed the will apart from Section 15 of the Act. This construction gave an absolute estate to the daughter. Then, applying that section, this estate is pronounced void, with a resultant intestacy. See *In re Townsend's Estate*, 34 Ch. D. 357. But in another case whose facts seem indistinguishable from those of the principal case, it was held that the alternative gift vested, treating the clause containing the void devise as if blotted out of the will. *In re Clark*, 31 Ch. D. 72. It is submitted that the latter result not only has the merit of preventing an entire failure of the testator's wishes, but is supportable on principle. It is settled that a devise to a class of which the attesting witness is a member is construed to be to the members of the class capable of taking; and upon the same principle, the gift in the present case might fairly be construed as to the daughter, if capable of taking, otherwise to her children. *Cf. Fell* v. *Biddolph*, L. R. 10 C. P. 701.

WILLS — CONSTRUCTION — CY-PRES DOCTRINE. — A testator devised real estate to his children, and in case they should leave issue, the share of each child to his or her children for life, share and share alike, so to be continued in a descending line *per stirpes* from issue to issue for life, the children of the parent dying taking the parent's share equally between them in all cases of decease. There was no devise over. *Held*, that the *cy-pres* doctrine is inapplicable, and that the estates will not be construed as an estate tail. *In re Richardson*, [1904] 1 Ch. 332.

Estates were limited in a will to W. for life, remainder to his sons born during the testator's lifetime successively for life, remainder after the decease of each such son to his sons successively in tail male, remainder to W.'s sons born after the testator's death successively in tail male, remainder to W.'s daughters successively, remainder after the death of each daughter to her sons successively in tail male, remainder to testator's daughter E. for life, remainder to her sons successively in tail male, remainder to her daughters successively, etc. *Held*, that the *cy-pres* doctrine is not applicable, and that the estates limited will not be construed either an estate tail or an estate tail male in W. *In re Rising*, [1904] 1 Ch. 533. See NOTES, p. 559.

WITNESSES — PRIVILEGED COMMUNICATION BETWEEN PHYSICIAN AND PATIENT. *Held*, that a physician who treats a person against his will cannot give in evidence information concerning such person obtained in the course of the treatment. *Meyer* v. *Knights of Pythias*, 178 N. Y. 63.

In most states a physician is forbidden by statute to disclose in testimony, upon objection by the patient or his representatives, information regarding the patient, gained while acting in his professional capacity. Although in some jurisdictions only confidential communications seem to be protected, generally, when once the relation of physician and patient exists, any information, acquired either from statements of the patient or from examination and observation, is privileged. *Prader* v. *National, etc., Ass'n*, 95 Ia. 149; *cf. Scripps* v. *Foster*, 41 Mich. 742. If a person voluntarily submits to a mere examination by a physician employed by an opponent, he does not thereby become a patient within the meaning of the statutes. *People* v. *Kemmler*, 119 N. Y. 580. But if such physician, after the examination, prescribes for the person, the relation is at once established. *Freel v. Market St. Ry. Co.*, 97 Cal. 40. Since the statutes governing the question were passed for the benefit of the patient, the present decision seems sound in holding that the fact of treatment, rather than consent, is decisive in establishing such relation. Otherwise, the object of the statute would be defeated by compelling a patient thus to furnish evidence against himself.